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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ADEL SOMO et al., Plaintiff and Appellant, v. JONES, WALDO, HOLBROOK & MCDONOUGH, P.C., et al., Defendants and Respondents.	D054556 (Super. Ct. No. 37-2007-0065405-CU-OR-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Joan M. Lewis, Judge. Affirmed.

In connection with their purchase of allegedly contaminated real property, plaintiffs and appellants Adel and Muntaha Somo sued the property seller's attorneys, defendants and respondents Jones, Waldo, Holbrook & McDonough, P.C. (Jones Waldo), John Palmer, Timothy Anderson and Sean Sullivan (at times collectively Jones Waldo or the attorney defendants), for fraud and conspiracy, in part alleging the attorney defendants had agreed to conceal and misrepresent known facts concerning soil and

groundwater contamination on and around the property. Applying the "agent-immunity rule," the trial court sustained Jones Waldo's demurrer to plaintiffs' third amended complaint without leave to amend. On appeal from the ensuing judgment of dismissal, plaintiffs contend in part that they alleged facts demonstrating a civil conspiracy or aiding and abetting the commission of a tort premised on the attorney defendants' violation of independent duties owed to them.

As we shall explain, we conclude that plaintiffs cannot state a cause of action for fraud or conspiracy against the attorney defendants. Nor can plaintiffs amend their pleading to state a cause of action for civil aiding and abetting fraud because such a claim is barred by the agent's immunity rule. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

We accept as true all material allegations of the operative third amended complaint, regardless of plaintiffs' ability to later prove them. (*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 806; *Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 173, fn. 1.)[1]

In April 2004, plaintiffs purchased real property in Chula Vista, California on which a Chevron gas station was being operated (the property). The purchase was structured as a gift from the original property owner, Elvin Anderson (in his capacity as

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1 The attorney defendants maintain that plaintiffs have made only five competent factual allegations against them. We disagree with their assessment of the quality of plaintiffs' allegations. "In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." (Code Civ. Proc., § 452.)

trustee of his family trust) to Dixie College Foundation (Foundation), and simultaneous sale from Foundation to an entity, Christo, Inc., that eventually assigned its rights to plaintiffs. Elvin Anderson and Foundation used the same law firm, Jones Waldo, to jointly represent them in the negotiations, transactions and various escrows leading to the purchase, and Jones Waldo was aware that plaintiffs would be the ultimate purchasers.[2] Plaintiffs subsequently learned that the property had been previously contaminated with petroleum product and was the subject of a pending San Diego County Department of Environmental Health (DEH) "corrective action" order.

Before the close of escrow on the property transaction, Elvin Anderson provided either Foundation or attorney Palmer with a copy of all of his service station file documents relating to the property's contamination, including the 1995 DEH order and 1996 and 2002 letters from a Chevron consultant, SECOR, regarding the installation of monitoring wells on or around the property to investigate unresolved groundwater

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2 According to the third amended complaint's allegations, the original deal was to be a sale between plaintiffs and the Chevron dealer at the property, Ted Park, who sought to purchase the property from Elvin Anderson. Specifically, plaintiffs allege that in about June 2003, Adel Somo and Park opened escrow for the sale of Park's business to plaintiffs, contingent on Park arranging to have the property sold to them free of contamination, with Jones Waldo attorneys Palmer and Sullivan helping Elvin Anderson in connection with that deal. They allege that during a telephone call, Elvin Anderson represented that the property was "clean" with "no contamination." They allege that in the meantime, Foundation and Jones Waldo convinced Elvin Anderson that he could avoid capital gains tax by gifting the property to Foundation. Elvin Anderson and his wife later eliminated Park from the transaction and the deal proceeded with separate escrows between Elvin Anderson and Foundation, and Foundation and Christo, Inc., coordinated by a dual real estate agent, Century 21 Paradigm. Our reference to Elvin Anderson is meant to include the Elvin M. Anderson Family Trust, Dated May 17, 1977.

contamination. Palmer's discovery of an environmental issue on the property relating to contamination made him uncomfortable handling the transactions on his own.

In July 2003, as part of Foundation's environmental due diligence, attorney Sullivan and a Foundation representative spoke with Ted Park, the gas station operator at the site, and Sullivan's notes reflect discussions about plastic liners and the fact the County would "close holes." Foundation and its board also discussed a "Phase 1" with Jones Waldo's environmental attorney Lucy Jenkins. A "Phase 1" is commonly used to signify the examination of government records, visual inspection of property for signs of contamination, and interviews with owners and lessees for purposes of determining if contamination is known or suspected and if there are outstanding governmental orders. During July 2003, attorneys Sullivan, Jenkins and Timothy Anderson, who was also Foundation's president until February 2004 (hereafter Tim Anderson or attorney Anderson), discussed site cleanliness and Jones Waldo gathered environmental information from Park. Between July and September 2003, Jenkins and Tim Anderson researched California environmental law relating to Foundation's acceptance of a service station property, looking for ways to prevent or minimize liability to Foundation due to contamination.

In order to minimize the chance of liability, Foundation and its board wanted to avoid being in the "chain of title." With Jones Waldo's coordination using a joint real estate agent and escrow company, defendants calculated having a simultaneous closing so as to come closest to that goal. Attorney Palmer knew that Foundation did not want to hold title until it had a buyer.

In November 2003, Park wrote Elvin Anderson a letter that was copied to attorney Sullivan and Foundation's secretary. Park stated he had begun the process of having the land thoroughly checked for contamination at Foundation's request and providing documentation to it regarding "responsibility for contamination, if present." He wrote that he had faxed copies of letters to Foundation stating Chevron was responsible and had asked Chevron that the land and fuel containers be checked for contamination, but " '[f]rom one of the checks I have learned that the spill and vapor buckets show some signs of contamination in the area of the tanks and Chevron has 30 days to rectify any contamination.' " Park stated, " 'I completely understand the college's wishes to ensure that they are not held responsible for any contamination on the land.' " Tim Anderson discussed the letter with Foundation's board at a December 16, 2003 board meeting, and the board renewed discussions about securing pollution insurance. Foundation's board, however, conspired to avoid documenting their discussion about known contamination at the property and deliberately withheld that discussion from the meeting minutes. Later, Tim Anderson, Palmer and Sullivan denied receiving Park's November 2003 letter in depositions, and tried to hide their knowledge of contamination from that letter, though Tim Anderson testified they had received the letter and discussed it at the December 2003 meeting.

Despite knowing of new contamination, on December 16, 2003, Foundation's executive committee, including Tim Anderson, decided that Foundation should take the property as soon as possible and obtain pollution insurance. No later than that date, defendants had decided they needed to acquire the property quickly or risk that the

property owners might die before that happened, and that disclosure of adverse environmental information would prevent Foundation from effectuating a sale quickly and obtaining "top dollar." In February 2004, Randy Wilkinson succeeded Tim Anderson as Foundation's president.

At some point, Foundation delegated to attorney Palmer the task and responsibility for complying with the disclosure terms of the purchase agreement. Under Palmer's direction, Foundation decided what its disclosure obligations were, and although Wilkinson had previously read about a possible leaking underground storage tank in an environmental disclosure report (which Palmer also possessed) and realized it meant there might be some contamination, he did not feel there was any problem to report. Neither Foundation nor Palmer complied with disclosure requirements contained in the purchase agreement or imposed by Health and Safety Code section 25359.7[3] despite the fact that all of the defendants knew about contamination issues. As part of the ongoing conspiracy, the defendants failed to make those disclosures, but instead concealed adverse information. Escrow closed on the property on April 21, 2004.

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3 "Any owner of nonresidential real property who knows, or has reasonable cause to believe, that any release of hazardous substance has come to be located on or beneath that real property shall, prior to the sale, lease, or rental of the real property by that owner, give written notice of that condition to the buyer, lessee, or renter of the real property. Failure of the owner to provide written notice when required by this subdivision to the buyer, lessee, or renter shall subject the owner to actual damages and any other remedies provided by law. In addition, where the owner has actual knowledge of the presence of any release of a material amount of a hazardous substance and knowingly and willfully fails to provide written notice to the buyer, lessee, or renter, as required by this subdivision, the owner is liable for a civil penalty not to exceed five thousand dollars ($5,000) for each separate violation." (Health & Saf. Code, § 25359.7, subd. (a).)

In January and May 2005, after plaintiffs learned of the contamination, Palmer wrote letters to plaintiffs containing statements the defendants knew to be false: first, that Foundation and the property owners were not made aware of contamination at the time of the property's sale, and second, that the DEH Order was " 'passed on to Chevron, and, pursuant to that letter, Chevron installed a new tank and/or other material which satisfied the County's concerns.' "

In April 2007, plaintiffs sued Anderson and Foundation for breach of contract and fraud, among other causes of action. They amended their pleading several times, eventually filing a third amended complaint in May 2008 in which they replaced Doe defendants with Jones Waldo and attorneys Tim Anderson, Palmer and Sullivan. Plaintiffs included the attorney defendants in a single cause of action for "Fraud/Deceit (and Conspiracy)." They allege generally that Jones Waldo and its attorneys acted as fiduciaries to both Foundation and Anderson, who were acting as each other's agents, and Jones Waldo was thus obligated to share and communicate information among their clients in the three-way deal.

In connection with their fraud/conspiracy cause of action, plaintiffs incorporated all prior allegations and allege that no later than December 16, 2003, defendants knew about (1) the new release of fuel reported by Park in November 2003; (2) Chevron's 1995 discovery of the release of fuel from leaking tanks at the Property; and (3) Elvin Anderson's knowledge of the outstanding DEH order and ongoing contamination on his property. They allege: "Despite that knowledge, [Foundation] and its Board, in conspiracy with all Defendants, decided to acquire the Property as quickly as possible

due to their concerns about losing the Property due to the Andersons' advanced age and the possibility they might lose a substantial gift if [Foundation] were to delay." According to plaintiffs, no later than December 16, 2003, defendants "agreed and conspired to a plan for [Foundation] to acquire the Property from the Andersons and sell the Property as quickly as possible and to try to 'sanitize' the sale of contaminated Property to the [plaintiffs] by virtue of the 'gift' to [Foundation]"; "agreed to fraudulently conceal and misrepresent known and/or assumed facts concerning the outstanding DEH Order, soil and/or groundwater contamination, both on and off the Property, difficulties the [plaintiffs] would likely have in selling, developing, and/or using the Property"; "allowed the appraised value to come in artificially high by failing to inform the appraiser of the DEH Order and contamination"; and "failed to inform that Chevron's Lease would cover any contamination." They further allege that Elvin Anderson's and Foundation's knowledge was conveyed to the attorney defendants, whose knowledge was likewise conveyed back to Anderson, Foundation and Foundation's board.

Plaintiffs allege that the defendants "collectively" knew and conspired to conceal or misrepresent certain information in order to defraud plaintiffs, including (1) defendants' understanding as of September 2003 that there was an "open case" and outstanding DEH order against Elvin Anderson and the property concerning unresolved contamination and that any new owner would have some liability for any contamination; (2) Park's November 2003 report of new contamination and his opinion that sites like the property at issue often end up sitting vacant for years without a buyer or with a buyer who insists on a steep price discount; (3) the fact that Tim Anderson discussed Park's

November 2003 letter with the Foundation's board, which then renewed its discussion about getting pollution insurance; and (4) the fact that the pollution insurance application would have required disclosure of the DEH order and contamination. Plaintiffs allege that as part of the ongoing conspiracy, defendants "either declined to complete the pollution insurance application in order to avoid having to share known adverse and material information with third parties, or completed it and have concealed it, and/or obtained or did not obtain insurance itself, and have concealed all of the above." They also allege that as part of the conspiracy, defendants either declined to secure a Phase 1 or secured such a study but concealed its adverse results.

Plaintiffs allege that Jones Waldo advised the other defendants that the Chevron lease would "cover" the property's owner for any contamination, which information was conveyed to plaintiffs by Foundation without confirming whether Chevron agreed with such interpretation or with Foundation concealing the results of any contrary information from Chevron. They allege that Jones Waldo and attorneys Palmer and Tim Anderson all helped prepare, enable and complete the plan to conceal and defraud plaintiffs, and that attorney Sullivan participated in the conspiracy (even though he left Jones Waldo at the end of December 2003) by failing to take any action to ensure disclosure of the information alleged in the complaint.

Jones Waldo generally demurred to the third amended complaint on grounds it failed to state facts sufficient to constitute any cause of action against it. Specifically, it argued (1) plaintiffs did not comply with Civil Code section 1714.10, which required that they obtain a prefiling order authorizing their cause of action; (2) plaintiffs' conspiracy

cause of action was barred under the "agent-immunity rule"; and (3) the trial court should dismiss the cause of action against the attorney defendants on due process and public policy grounds because they were unable to present all material evidence in their defense.

Plaintiffs opposed the demurrer in part arguing that the attorney defendants owed them an independent duty to refrain from engaging in fraud in connection with the real estate purchase transaction. Following arguments on the matter, the trial court sustained the demurrer without leave to amend, ruling the agent-immunity rule applied and plaintiffs did not allege facts to support any exception to that rule. Following entry of judgment in the attorney defendants' favor, plaintiffs filed this appeal.

DISCUSSION

I. *Application of Civil Code Section 1714.10, Subdivision (a)*

The trial court did not address Jones Waldo's contention that plaintiffs' cause of action was barred by Civil Code section 1714.10. Jones Waldo raises the argument again on appeal, arguing that the statute applies because "all of the alleged conspiratorial conduct involving [Jones Waldo] was within [Jones Waldo's] attorney-client relationship with Dixie Foundation and Elvin Anderson" and its conduct — which it characterizes as "writing letters on behalf of its clients, researching environmental issues, and handling its clients' disputes" — arose from "issues related to the sale of the property." Jones Waldo maintains that plaintiffs' cause of action is designed to disrupt the attorney-client relationship, and thus is the type of claim that should fall within the statute. As we explain, we disagree that Civil Code section 1714.10 applies.

A. *The Statute*

Civil Code Section 1714.10, subdivision (a)[4] provides that no cause of action may be included in a complaint or other pleading without prior court approval, if the cause of action is directed "against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and . . . is based upon the attorney's representation of the client." Civil Code section 1714.10 is a "gatekeeping" statute that is " 'intended to weed out the harassing claim of conspiracy that is so lacking in reasonable foundation as to verge on the frivolous.' " (*Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802, 809, 815 (*Berg*).) Under the statute, a plaintiff's failure to obtain the required court order is "a defense to any action for civil conspiracy," that may be raised "by demurrer, motion to strike, or such other motion or application as may be appropriate." (Civ. Code, § 1714.10, subd. (b).)

B. *Exceptions*

In addition to the requirement that the alleged conspiracy arise from an "attempt to contest or compromise a claim or dispute," there are two exceptions to the prefiling requirement of Civil Code section 1714.10. (*Berg*, *supra*, 131 Cal.App.4th at p. 816.) Civil Code section 1714.10 does "not apply to a cause of action against an attorney for a

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4 In full, Civil Code section 1714.10, subdivision (a) states: "No cause of action against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney's representation of the client, shall be included in a complaint or other pleading unless the court enters an order allowing the pleading that includes the claim for civil conspiracy to be filed after the court determines that the party seeking to file the pleading has established that there is a reasonable probability that the party will prevail in the action."

civil conspiracy with his or her client, where (1) the attorney has an independent legal duty to the plaintiff, or (2) the attorney's acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney's financial gain." (Civ. Code, § 1714.10, subds. (c)(1) & (c)(2).) These two exceptions in Civil Code section 1714.10, subdivision (c) reflect the limits on an attorney's liability for conspiracy put in place by the California Supreme Court in *Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39 (*Doctors' Co.*). (*Berg*, *supra*, 131 Cal.App.4th at pp. 816-818, 826.)

Given the statute's organization, "[a]pplying [Civil Code] section 1714.10 thus requires the court to initially determine whether the pleading fails either within the coverage of the statute, or, instead, within one of its stated exceptions. This [latter] determination pivots, in turn, on whether the proposed pleading states a viable claim for conspiracy against the attorney. [Citation.] . . . If such a claim is stated, the analysis ends before reaching evidentiary considerations; the statute does not apply because the claim necessarily falls within one of its exceptions. If it is not stated, the analysis likewise ends, but with the opposite result; the pleading is disallowed for its failure to meet the initial gatekeeping hurdle of the statute." (*Berg*, *supra*, 131 Cal.App.4th at p. 818.)

C. *Plaintiffs' Conspiracy Cause of Action Does Not Arise Out of an Attempt to Contest or Compromise a Claim or Dispute*

We need not decide whether plaintiffs' conspiracy cause of action falls within either exception of Civil Code section 1714.10, subdivision (c), because their claims do

not meet the required condition of subdivision (a), namely, they do not "arise[] from any attempt to contest or compromise a claim or dispute . . . ." (Civ. Code, § 1714, subd. (a).) The plain language of section 1714.10, subdivision (a) reveals that it was intended to apply to situations where the alleged conspiracy arose from the attorney's representation of his or her client in a previous (or current) legal dispute or litigation with the plaintiff. Thus, to fall within the statute it is not enough that all of the challenged conduct was within the scope of Jones Waldo's attorney-client relationship with Foundation and Elvin Anderson; the conduct must *also* arise from an attempt to compromise a claim or dispute.

Here, accepting plaintiffs' allegations as true, their claims arise from Jones Waldo's representation of Foundation in connection with the gift from Elvin Anderson and sale of the property to plaintiffs, and the attorney defendants' agreement to conceal material information about the property's condition to plaintiffs so as to facilitate the deal. With the exception of Palmer's January and May 2005 letters, at the time of Jones Waldo's and the attorney defendants' actions, there was no claim or dispute between plaintiffs and Foundation. Thus, Jones Waldo did not undertake Foundation's representation in connection with any dispute, and the conspiracy alleged by plaintiffs between the attorneys and Foundation did not arise out of any attempt to "contest or compromise" such a claim or dispute.

The fact Palmer later wrote letters to plaintiffs after a dispute arose does not bring plaintiffs' conspiracy cause of action within the statute. The word "arise" means "to originate from a source." (Merriam-Webster's Collegiate Dict. (11th ed. 2006) p. 66, col. 2; see also *Palmer v. Agee* (1978) 87 Cal.App.3d 377, 386 [arise is defined as " 'to

originate from a specified source' " or "to come into being"]; *Hartford Accident & Indem. Co. v. Civil Service Employees Ins. Co.* (1973) 33 Cal.App.3d 26, 32 ["The phrase 'arising out of' is equated with origination, growth or flow from the event"], distinguished on other grounds in *State Farm Mutual Auto Ins. Co. v. Grisham* (2004) 122 Cal.App.4th 563, 568-569.) Plaintiffs' cause of action does not arise from Palmer's letters, but rather from Jones Waldo attorneys' actions in connection with the real property purchase transaction, concealing material information that should have been disclosed to plaintiffs in connection with that deal. As a result, plaintiffs were not required to meet the prefiling requirements of Civil Code section 1714.10.

II. *Demurrer*

Plaintiffs advance several interconnected arguments challenging the order sustaining the demurrer. They contend the so-called agent-immunity rule does not apply where an attorney commits fraud, and here they have adequately alleged conspiracy to commit fraud based on Jones Waldo's independent duty to avoid defrauding them: a duty that is imposed by California and Utah law, those states' rules of professional conduct, and policy considerations. Plaintiffs alternatively argue they adequately alleged a theory of aiding and abetting fraud, which does not require an independent duty. They point out that concealment is a species of fraud and equivalent to an affirmative act, and once Jones Waldo agreed to make disclosures on Foundation's behalf, it had to be fully truthful and was not privileged to suppress or omit material information. In connection with this argument, plaintiffs maintain that Jones Waldo assumed Foundation's contractual, common law, and statutory obligations to make material disclosures to them about the

property. Finally, plaintiffs assert that Tim Anderson was sued in two capacities: as a Jones Waldo attorney and as Foundation's president, and because he could be liable for fraud in his capacity as Foundation's president, the court improperly included him within its judgment of dismissal.

A. *Standard of Review*

The applicable appellate review standard is settled: " ' "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.' " (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) In reviewing the pleadings, we are not bound by the determination of the trial court, but are required to render our independent judgment on whether a cause of action has been stated. (*Hoffman v. State Farm & Casualty Co.* (1993) 16 Cal.App.4th 184, 189.)

B. *Duty of Care*

In its demurrer, Jones Waldo's main contention relating to the sufficiency of the pleading was that the cause of action was barred by the agent-immunity rule because Jones Waldo "acted at all times within the scope of their [*sic*] representation of [Elvin] Anderson and . . . Foundation"; that "there are no factual allegations that would suggest that Jones Waldo ever acted outside the scope of their [*sic*] attorney-client relationship."[5] Relying on *Goodman v. Kennedy* (1976) 18 Cal.3d 335 (*Goodman*), *Fox v. Pollack* (1986) 181 Cal.App.3d 954, and *Heliotis v. Schuman* (1986) 181 Cal.App.3d 646, Jones Waldo also argued "an attorney does not owe a duty to parties with whom his or her client deals at arms length" and "[i]n a real estate transaction, an attorney owes no duty of care to the unrepresented party who is negotiating with the attorney's client, or to the ultimate buyer of the real property."

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5 Jones Waldo did not otherwise squarely attack the sufficiency of plaintiffs' allegations of the elements of fraud or conspiracy. A typical argument, for example, is that fraud is not pleaded with the requisite specificity; that to meet those requirements, one must plead who said what to whom, when, and in what manner. (E.g., *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 296 (*Vega*).) Jones Waldo acknowledged that plaintiffs had alleged it knew of the contamination before plaintiffs purchased the property. However, it then maintained that the sole "factual" allegations in plaintiffs' third amended complaint were that (1) attorney Sullivan wrote to Park on November 14, 2003, informing him that the Andersons were no longer willing to sell the property to him; (2) Jones Waldo attorneys researched California environmental law and conducted due diligence for Foundation; (3) attorney Palmer prepared a letter on his clients' behalf in January 2005 in response to a letter from the plaintiffs' real estate agent; and (5) Palmer wrote a letter on May 4, 2005 in response to plaintiffs' claims that Foundation and Elvin Anderson had known about but withheld their knowledge of contamination at the time of the sale. Jones Waldo did not expressly argue, or explain how or why, the remaining allegations were improper conclusions, deductions or contentions that the trial court should disregard.

On appeal, Jones Waldo repeats these arguments, pointing out that it cannot be held liable for conspiracy or aiding and abetting unless it is personally bound by the duty violated, and under California law it had no duty of disclosure to plaintiffs, who were "non-client buyers." It argues the gravamen of plaintiffs' third amended complaint is that Jones Waldo had a duty to disclose to plaintiffs that there was contamination, despite allegations that make it clear that Jones Waldo represented Foundation and acted only within the scope of the attorney-client relationship, not for its own financial advantage.

We will reverse the order sustaining the demurrer without leave to amend if plaintiffs sufficiently allege that Jones Waldo owed them a duty of care, even though the attorneys represented Foundation in the purchase transaction, not plaintiffs. Plaintiffs' theory of fraud rests on Jones Waldo's alleged fraudulent nondisclosure,[6] and under that theory the tort of deceit requires that plaintiffs prove "[t]he suppression of a fact, by one who is bound to disclose it . . . ." (Civ. Code, § 1710, subd. (3); see *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 868 [action based on fraud or deceit based on concealment requires that the defendant have a duty to disclose

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6 To the extent plaintiffs seek to base their cause of action on Palmer's affirmative misrepresentations in his January and May 2005 letters, they cannot allege actual reliance on those representations to their detriment. (See *OCM Principal Opportunities Fund v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 864 [to prove actual reliance, plaintiff must establish a complete causal relationship between the alleged misrepresentations or omissions and the harm claimed to have resulted therefrom]; *Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798, 808.) Because the January and May 2005 letters were sent after the close of escrow, plaintiffs cannot say those misrepresentations induced them to enter into the purchase of contaminated property.

the fact to the plaintiff]; *Lovejoy v. AT&T Corp.* (2004) 119 Cal.App.4th 151, 157-158.) If plaintiffs sufficiently allege a duty of care, we may likewise uphold plaintiffs' conspiracy allegations because an attorney can be liable for conspiring with their clients when the attorney violates "the attorney's own duty to the plaintiff." (*Doctors' Co.*, *supra*, 49 Cal.3d at p. 47; *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 511 (*Applied Equipment*) [tort liability arising from conspiracy "presupposes that the coconspirator is legally capable of committing the tort, i.e., that he or she owes a duty to plaintiff recognized by law and is potentially subject to liability for breach of that duty"]; *Pavicich v. Santucci* (2000) 85 Cal.App.4th 382, 392.) As we shall explain, under the circumstances alleged in plaintiffs' third amended complaint, no such duty appears.

In *Goodman*, *supra*, 18 Cal.3d 335, our Supreme Court addressed "whether or under what circumstances an attorney's duty of care in giving legal advice to a client extends to persons with whom the client in acting upon the advice deals wholly at arm's length." (*Id*. at p. 339.) There, the plaintiffs alleged an attorney negligently advised his clients and consciously withheld certain facts relating to stock purchased by the plaintiff from the attorney's clients. (*Id*. at pp. 339, 341-342.) The court held that an attorney advising a client owes no duty to third parties affected by that advice "in the absence of any showing that the legal advice was foreseeably transmitted to or relied upon by plaintiffs or that plaintiffs were intended beneficiaries of a transaction to which the advice pertained." (*Id*. at p. 339; but see *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 411-412 [upholding principle, but pointing out that "foreseeably transmitted" language in *Goodman* is dictum].) In part, *Goodman* reasoned: "The present defendant

had no relationship to plaintiffs that would give rise to his owing plaintiffs any duty of care in advising his clients that they could sell the stock without adverse consequences. There is no allegation that the advice was ever communicated to plaintiffs and hence no basis for any claim that they relied upon it in purchasing or retaining the stock. Nor was the advice given for the purpose of enabling the defendant's clients to discharge any obligation to plaintiffs. Thus, there is no allegation that plaintiffs had any relationship to defendant's clients or to the corporation as stockholders or otherwise when the advice was given." (*Id*. at pp. 343-344.)

The *Goodman* court rejected the plaintiffs' argument that because the attorney's advice related to a possible sale of stock by his clients, his duty of care in giving advice extended to anyone to whom the sale might be made. It reasoned that the "[p]laintiffs' only relationship to the proposed transaction was that of parties with whom defendant's clients might negotiate . . . at arm's length. Any buyers' 'potential advantage' from the possible purchase of the stock 'was only a collateral consideration of the transaction' [citation] and did not put such potential buyers into any relationship with defendant as 'intended beneficiaries' of his clients' anticipated sales." (*Goodman, supra,* 18 Cal.3d at p. 344.) The court rejected the plaintiffs' argument that the defendant's advice was " 'intended to affect' " them as purchasers and that the harm to them was foreseeable from the adverse effect of the sale: "[P]laintiffs were not persons upon defendant's clients had any wish or obligation to confer a benefit in the transaction. Plaintiffs' only relationship to the proposed transaction was that of parties with whom defendant's clients might negotiate a bargain at arm's length." (*Ibid*.) The court further explained the undesirable

public policy underlying plaintiffs position: "To make an attorney liable for negligent confidential advice not only to the client who enters into a transaction in reliance upon the advice but also to the other parties to the transaction with whom the client deals at arm's length would inject undesirable self-protective reservations into the attorney's counseling role. The attorney's preoccupation or concern with the possibility of claims based on mere negligence (as distinct from fraud or malice) by any with whom his client might deal 'would prevent him from devoting his entire energies to his client's interests' [citation]. The result would be both 'an undue burden on the profession' [citation] and a diminution in the quality of the legal services received by the client." (*Goodman*, at p. 344.)

Goodman specifically distinguished the circumstances presented in *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz* (1976) 57 Cal.App.3d 104 (*Roberts*). There, a law firm prepared a letter for a client with the knowledge that the client would show it to a prospective lender in order to obtain a loan for a company, BBC. (*Id*. at p. 107.) The letter expressed the legal opinion that the client was a general partnership but failed to reveal that many of the alleged general partners claimed that the entity was a corporation or a limited partnership. (*Id*. at p. 108.) When the entity defaulted on the loan, the lender sued numerous persons, and asserted causes of action for fraud and negligent misrepresentation against the law firm. (*Id*. at p. 107.)

The *Roberts* court held the plaintiff did not state a cause of action for fraud or deceit because he did not plead that the defendants gave their written opinion with fraudulent intent, a "crucial" allegation. (*Roberts, supra*, 57 Cal.App.3d at pp. 109-110.)

However, it held the plaintiff stated a cause of action for negligent misrepresentation as against a general demurrer; that the law firm had a duty to the lender because it "undertook, on behalf of their clients, to assist in securing loans from various persons, including plaintiff, for the benefit of BBC" and its "opinion concerning the status of the partners was rendered for the purpose of influencing plaintiff's conduct, and harm to him was clearly foreseeable. We have no difficulty, therefore, in determining that the issuance of a legal opinion intended to secure benefit for the client, either monetary or otherwise, must be issued with due care, or the attorneys who do not act carefully will have breached a duty owed to those they attempted or expected to influence on behalf of their clients." (*Id.* at p. 111.) The Court of Appeal concluded the plaintiff had stated a cause of action because "defendants knew about the *doubt* as to the status of the partnership because of the contention of certain partners that they were limited partners, only, and knowingly failed to reveal that doubt to plaintiff. . . . [T]he firm had a duty to reveal to plaintiff this doubt . . . , since the firm knew that disclosure of this doubt might well be determinative of plaintiff's decision to make loans to BBC." (*Ibid.*) *Goodman* characterized *Roberts* as a case where "an attorney gives his client a written opinion with the intention that it be transmitted to and relied upon by the plaintiff in dealing with the client. In that situation the attorney owes the plaintiff a duty of care when providing the advice because the plaintiff's anticipated reliance upon it is 'the end and aim of the transaction.' " (*Goodman*, *supra*, 18 Cal.3d at p. 343, fn. 4.)

Here, plaintiffs' third amended complaint is not a model of pleading or organization. (See *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC*, *supra*, 162

Cal.App.4th at p. 867-868, fn. 1.) Even viewing its allegations liberally and drawing reasonable inferences from them as we must, we cannot say they demonstrate a duty of care on Jones Waldo's behalf falling within the reach of *Roberts* or other cases relying on *Roberts* in which an attorney's legal opinion was rendered for the purposes of influencing a third party's conduct. (E.g., *Courtney v. Waring* (1987) 191 Cal.App.3d 1434 [plaintiffs alleged attorneys negligently prepared a franchise prospectus that was to be shown to prospective franchisees, and information would be used to induce the plaintiffs to purchase franchises]; *Vega, supra,* 121 Cal.App.4th at pp. 287, 292 [attorneys made a partial disclosure, concealing unfavorable terms of a financing transaction involving its client in order to deceive the shareholder into exchanging his stock in the merger].) This is because Foundation and plaintiffs were dealing at arms length in a sales transaction, a circumstance generally involving adverse interests. (See 1 Mallen & Smith, Legal Malpractice (2009 ed.) Privity of Contract — Duty beyond privity of contract, § 7:8, p. 912.) Thus, any duty of disclosure we would impose on Jones Waldo is negated by their attorney-client relationship with Foundation. (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 337; *Skarbrevik v. Cohen, England & Whitfeld* (1991) 231 Cal.App.3d 692; *Heliotis v. Schuman, supra,* 181 Cal.App.3d 646; *Fox v. Pollack* (1986) 181 Cal.App.3d 954.)

In *LiMandri*, this court recounted the facts in *Heliotis*, where "the appellate court refused to extend a real estate broker's duty of disclosure to an attorney representing the sellers of real property. The court stated: 'The imposition of a duty to disclose on an attorney who merely acts as a conduit for sellers in a real estate transaction . . . would

compromise the underpinnings of the attorney-client relationship — an attorney's duties to his or her client to keep confidences, to zealously represent the client, and to give undivided loyalty to the client. [Citations.] [The attorney] owed his allegiance solely to the [sellers], his clients.' " (*LiMandri v. Judkins*, at p. 338, quoting *Heliotis*, at p. 650-651.) We held in *LiMandri* that an attorney's duty of undivided loyalty to his client superceded any duty on his part to disclose information to another party's lawyer regarding a loan transaction.

In *Fox v. Pollack*, the court concluded an attorney owed no duty to offer advice to an unrepresented party about a real estate exchange transaction in which the attorney represented another, "in the absence of contrary representations by the attorney." (*Fox v. Pollack*, *supra*, 181 Cal.App.3d at p. 957.) "[A]n attorney has no duty to protect the interests of an adverse party [citations] for the obvious reasons that the adverse party is not the intended beneficiary of the attorney's services, and that the attorney's undivided loyalty belongs to the client. [Citations.] The same principles apply to transactions where the nonclients deal at arm's length with the attorney's clients." (*Id*. at p. 961, fn. omitted; see also *B.L.M. v. Sabo & Deitsch* (1997) 55 Cal.App.4th 823, 832 [fact that developer stood to benefit from project's successful completion did not make developer a third party beneficiary of an employment agreement between a city and the law firm that acted as bond counsel for the project; in order to show a duty was owed to a third party beneficiary of a legal services agreement the third party must show that " 'that was the intention of the purchaser of the legal services-the party in privity,' and that 'imposition of the duty carries out the prime purpose of the contract for services' "].)

The circumstances here are more akin to *Goodman*, where even though the attorney's advice was intended to affect the plaintiffs and harm to them from the attorney's negligence was foreseeable, the "plaintiffs were not persons upon whom defendant's clients had any wish or obligation to confer a benefit in the transaction." (*Goodman*, *supra*, 18 Cal.3d at p. 344.) The potential buyers in *Goodman* were not the intended beneficiaries of the attorney's client's anticipated sales. *Goodman*'s reasoning, and that of *Heliotis v. Schuman*, *supra*, 181 Cal.App.3d 646 and *Fox v. Pollack*, *supra*, 181 Cal.App.3d 954, compel us to conclude that Jones Waldo did not owe plaintiffs a duty of care under these circumstances.

Plaintiffs' reliance on *Shafer v. Berger, Kahn, Shafton, Moss, Fiegler, Simon & Gladstone* (2003) 107 Cal.App.4th 54 does not persuade us otherwise. In *Shafer*, plaintiffs adequately alleged the insurer's attorney made a fraudulent statement about the scope of coverage in a letter to plaintiff's attorney (an affirmative misrepresentation). Likewise, in *Cicone v. URS Corporation* (1986) 183 Cal.App.3d 194, the buyer's attorney made affirmative misrepresentations to the seller's attorney during negotiations that were intended to induce the sellers to close the sale of a business. (*Id*. at pp. 208-211.) Here we deal with a very different claim by plaintiffs: that the attorney defendants were obligated to disclose material information to them, an adverse party in the transaction. Plaintiffs further argue that the lawyers undertook or "assumed" Foundation's obligation to make disclosures to them; they point out that under *Goodman*, *supra*, 18 Cal.3d at p. 347, a duty to disclose arises "when one party to a transaction has sole knowledge or access to material facts and knows that such facts are not known to or reasonably

discoverable by the other party." But according to the complaint's allegations, Jones Waldo was not a *party* to the sales transaction, nor was it the seller of the property.

Contrary to plaintiffs' arguments, despite foreseeability or knowledge of the potential harm to them, policy considerations do not support imposing a duty of disclosure on Jones Waldo. (*Biakanja v. Irving* (1958) 49 Cal.2d 647; see also *Bily v. Arthur Young & Co.*, *supra*, 3 Cal.4th 370; *Adelman v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 352, 359-365 [discussing *Biakanja* factors and limitations on imposition of a duty of care in third party situations].) In *Biakanja*, the court held: "The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the forseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." (*Biakanja, supra,* at p. 650.) There, the court concluded "the 'end and aim' of the transaction" was to provide for the passing of the decedent's estate to the plaintiff, and observed that the defendant notary public had engaged in the unauthorized practice of law by preparing the will, an activity which public policy should not protect by immunity from civil liability. (*Id.* at p. 651.) Similarly, in *Lucas v. Hamm* (1961) 56 Cal.2d 583, 589, the court applied the *Biakanja* factors to hold that an attorney owes an intended beneficiary a duty of care in drafting a will: "As in *Biakanja,* one of the main purposes which the transaction between defendant and the testator intended to accomplish was to

provide for the transfer of property to plaintiffs. . . . " (*Lucas v. Hamm*, 56 Cal.2d at p. 589; see also *Heyer v. Flaig* (1969) 70 Cal.2d 223, 228 ["[w]hen an attorney undertakes to fulfill the testamentary instructions of his client, he realistically and in fact assumes a relationship not only with the client but also with the client's intended beneficiaries"], overruled on other grounds in *Laird v. Blacker* (1992) 2 Cal.4th 606, 617.)

Goodman expressly distinguished these cases involving the drafting of wills, and they are not comparable to the real property sales transaction at issue here. The aim of Jones Waldo's representation was to benefit Foundation, which had "[no] wish or obligation to confer a benefit" on plaintiffs, whose "only relationship to the proposed transaction was that of parties with whom defendant's clients might negotiate a bargain at arm's length." (*Goodman, supra,* 18 Cal.3d at p. 344.)

We acknowledge that the *Goodman* court separately recognized if an attorney defendant commits actual fraud in his dealings with a third party, "the fact that he did so in the capacity of attorney does not relieve him of liability. [Citations.] The limitations upon liability for negligence based the scope of an attorney's duty of care do not apply to liability for fraud." (*Goodman, supra*, 18 Cal.3d at p. 346; see also *Vega*, *supra*, 121 Cal.App.4th at p. 291; *Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone*, *supra*, 107 Cal.App.4th 54, 69; *Pavicich v. Santucci*, *supra*, 85 Cal.App.4th at p. 395; *Jackson v. Rogers & Wells* (1989) 210 Cal.App.3d 336, 345; *Cicone v. URS Corp.*, *supra*, 183 Cal.App.3d at p. 202; *Heliotis v. Schuman*, *supra*, 181 Cal.App.3d at p. 651.) But here, plaintiffs' only viable theory of fraud against Jones Waldo (see footnote 5, *ante*) is for fraudulent concealment, which requires an independent duty to disclose.

Having determined plaintiffs cannot allege such a duty, we conclude the trial court properly sustained Jones Waldo's demurrers to the fraud and conspiracy cause of action.

C. *Aiding and Abetting Fraud*

At this demurrer stage the question before us is whether plaintiffs' third amended complaint states a cause of action " 'under any possible legal theory.' " (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 810.) In opposition to Jones Waldo's demurrer, plaintiffs did not assert that they had alleged a viable claim for aiding and abetting liability. However, they now argue on appeal that they have sufficiently alleged such liability, which does not require an independent duty on the attorneys' part. Though we may consider their request,[7] we conclude they cannot state such a cause of action due to the agent's immunity rule.

Under the agent's immunity rule, "duly acting agents and employees cannot be held liable for conspiring with their own principals. . . ." (*Applied Equipment, supra*, 7 Cal.4th at p. 512.) The rule " 'derives from the principle that ordinarily corporate agents and employees acting for or on behalf of the corporation cannot be held liable for inducing a breach of the corporation's contract,' " (*id*. at p. 512, fn. 4), and it applies only

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7 Code of Civil Procedure section 472c, subdivision (a) states that "[w]hen any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made." Thus, "[e]ven where there is no request for leave to amend (or where . . . the only arguable request was wholly insufficient to suggest whether or how the plaintiff could amend) 'the question as to whether or not [the trial] court abused its discretion' in denying leave to amend remains open on appeal." (*CAMSI IV v. Hunter Technology Corp*. (1991) 230 Cal.App.3d 1525, 1542.)

to claims of conspiracy to commit a tort or violate a statute. (*Mintz v. Blue Cross of California* (2009) 172 Cal.App.4th 1594, 1605; citing *Doctors' Co., supra*, 49 Cal.3d at pp. 41, 45.)

Here, the doctrine serves to bar plaintiffs' attempt to state a cause of action for aiding and abetting. "Conspiracy is a concept closely allied with aiding and abetting. A conspiracy generally requires agreement plus an overt act causing damage. [Citation.] Aiding and abetting requires not agreement, but simply assistance. The common basis for liability for both conspiracy and aiding and abetting, however, is concerted wrongful action. [Citations.] A corporate employee cannot conspire with his or her corporate employer; that would be tantamount to a person conspiring with himself. Thus when a corporate employee acts in his or her authorized capacity on behalf of his or her corporate employer, there can be no claim of conspiracy between the corporate employer and the corporate employee. [Citations.] In such a circumstance, the element of concert is missing. [¶] Similar reasoning applies to aiding and abetting." (*Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 78.)

Under these facts, and given plaintiffs' allegations that Jones Waldo was acting as a fiduciary to Foundation and Elvin Anderson to jointly represent them with regard to "all aspects of all negotiations, transactions, and escrows described herein," we conclude as a matter of law that plaintiffs cannot allege the element of concert between Jones Waldo and Foundation for purposes of asserting a cause of action for aiding and abetting liability. We therefore deny plaintiffs' request for leave to amend.

D. *Allegations as to Jones Waldo Attorney Tim Anderson*

Plaintiffs contend Jones Waldo attorney Tim Anderson was not subject to the demurrer because he was sued in his capacity not only as an attorney but Foundation's president, where he served until Wilkinson replaced him in February 2004. The entirety of their argument on the issue is as follows: "The lawyers and lower court never discussed the fact that Tim Anderson was sued in two capacities — lawyer and Dixie President. The demurrer and court ruling never addressed the inherent problem of dismissing Tim Anderson due solely to his capacity as lawyer. No fact or argument was advanced why Dixie's board President could not be liable for fraud. The ruling was clear error."

The demurrer was expressly brought on behalf of Tim Anderson, in addition to Jones Waldo and the other attorney defendants. In opposition, plaintiffs merely pointed out they had sued him in two capacities: as an attorney and Foundation board member. Plaintiffs did not explain the legal significance of his dual capacity status with any argument or authority in the trial court, nor do they on appeal. Under settled appellate principles we presume the correctness of the trial court's order unless the appellant affirmatively demonstrates otherwise with reasoned argument and authority. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Wint v. Fidelity & Casualty Co*. (1973) 9 Cal.3d 257, 265; (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 594, p. 627.) Having no meaningful argument before us for our consideration, we do not address the point.

IV. *Due Process/Public Policy Arguments*

Having concluded plaintiffs' third amended complaint fails to state a cause of action against Jones Waldo, we need not address its argument, also made below in its demurrer, that we may uphold the trial court's order for reasons of due process and public policy.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

IRION, J.